IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

PROCK STONE,
Petitioner,
vs.
NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Respondent.

No. 320.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

MOTION FOR REHEARING AND SUGGESTIONS.

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MOTION.

Respondent respectfully moves the court to order a rehearing of the above cause.

GROUNDS.

Who has the ultimate jurisdiction—the Missouri Supreme Court or this court—to decide whether the evidence presents a fairly debatable question of negligence or causation?

This issue, to which this case now simmers down, is not discussed in the court's opinion. As this question involves hundreds of lawsuits and millions of dollars, and is itself "fairly debatable," Respondent earnestly requests the court to grant a rehearing that it may be adequately considered and authoritatively decided for the future guidance of litigants in F. E. L. A. cases.

CERTIFICATE.

I certify that this motion is presented in good faith and not for delay.

LON HOCKER.

SUGGESTIONS.

I.

In order to approach the jurisdictional problem it is necessary to examine the nature of the question: "Does the evidence present a fairly debatable issue of negligence and causation?" If this be a federal question, then this court has jurisdiction to answer it; otherwise not.

Jurisdiction to supervise *state* court judgments must depend, in the last analysis, upon sanctions of the United States Constitution.

As the court's opinion grants that reasonable minds might differ, it is apparent that the question might be decided either way without denying due process of law. Federal jurisdiction cannot, therefore, hang upon the Fourteenth Amendment.

For reasons discussed in Respondent's brief, pp. 8, 9, 10, 11, illustrating the differences between permissible State and Federal jury trials, Federal jurisdiction cannot hang on the Seventh Amendment. This is apparently conceded in the court's opinion by the one time substitution of the phrase "the trier of the facts" for "the jury" (p. 3).

That leaves as a basis for federality, so to speak, only the supremacy clause of Article VI. The clause reads:

> "This constitution and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby; . . ."

The "law" we are talking about (45 U. S. C. 51) affixes liability for "injury or death resulting in whole or in part from the negligence . . . of such carrier."

We concede that the meaning of the words "resulting" and "negligence" in this law are federal questions. But is it the meaning of these words that the court here decides?

Obviously not, for the opinion holds that the question of negligence *vel non* and causation *vel non* is for the *trier of the facts.* These *vel non* issues are, therefore, issues of fact by force of the court's own decision. They involve the credibility of the evidence, the weight of the evidence and the assaying of whatever mysterious imponderables go into the resolution of a fact issue. This court does not undertake to say that whenever such and such evidence appears, or even that whenever such and such evidence is found to be true, negligence or causation exits. The court only says that in such a case negligence may or may not be shown *according to the decision of the trier of the facts.* The opinion adds nothing to the definition of the statutory words "negligence" or "resulting." Under the opinion different "triers" might quite legitimately reach contrary results on identical evidence as to the *vel non* issues.

It follows that, however the *fact* issues be resolved, the *law* remains supreme. Jurisdiction to resolve the submissible evidence issue therefore cannot hang upon the supremacy clause. As there is nothing else to hang it on, no other conclusion can be reached but that jurisdiction to answer this question does not and cannot lie in this court.

II.

A determination of lack of Federal jurisdiction would seem to end the matter, yet a moment may be well spent in considering the jurisdiction for this purpose of the Mis-

souri Supreme Court. Plaintiff invoked the state courts. He did not have to do so. He took them as he found them. The question of to what extent a state jury's findings of fact are binding upon a state appellate court is surely a question of local, state law. If it were not so the Louisiana advisory jury practice and the states' appellate remittitur practice would violate the Federal Constitution. At the most the Missouri Supreme Court has rejected the jury's findings as incredible. This is permissible under state practice. It satisfies the State Constitution, as to which the Missouri court is the final interpreter, and in the enforcement of which this court is not involved.

III.

We cannot express our concern in more powerful words than those of this court in Driver's Union v. Meadowmoor Co., 312 U. S. 287, 294:

> "We can reject such a [state court] determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. *To substitute our judgment for that of the state court is to transcend the limits of our authority.*"

Respectfully submitted,

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